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No. 94-1243

In The

Supreme Court of the United States

October Term, 1994

STEVEN I. RADLOFF and BARBARA RADLOFF,

Petitioners,

vs.

FIRST AMERICAN NATIONAL BANK OF ST. CLOUD, N.A.; and FIRST FARM CORPORATION, INC. OF ST. CLOUD, a Minnesota Corporation; and LINDA SINOTTE, in her official capacity as a Court Administrator,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER THE FEDERAL DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUND THAT IT LACKED JURISDICTION UNDER THE *"ROOKER-FELDMAN* DOCTRINE" OVER A CASE PREVIOUSLY LITIGATED IN THE MINNESOTA STATE COURTS.

AND

WHETHER THE FEDERAL DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUND THAT IT LACKED JURISDICTION UNDER THE DOCTRINE OF RES JUDICATA OVER A CASE PREVIOUSLY LITIGATED IN THE MINNESOTA STATE COURTS.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents First American National Bank of St. Cloud, N.A. and First Farm Corporation, Inc. of St. Cloud (hereinafter "Bank") respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered October 20, 1994, affirming the trial court's grant of summary judgment to Respondents and denial of Petitioners' motions for a preliminary injunction and partial summary judgment.

STATEMENT OF CASE

A. Proceedings and Disposition in the Federal Courts Below.

On April 1, 1993, Petitioners brought a 42 U.S.C. § 1983 action against Respondents in the Federal District Court in Minnesota. The District Court granted Respondent Bank's summary judgment[1] on the basis that the Court lacked jurisdiction under the *Rooker-Feldman* doctrine and the matters were res judicata. The District Court's Order dated August 27, 1993, and the transcript explaining it are set forth in Petitioners' Appendix (Pet.App. A.5 and A.6). Petitioners appealed this judgment to the Court of Appeals for the Eighth Circuit.

On October 20, 1994, the Eighth Circuit panel affirmed the judgment upon a finding of no error that would require reversal. (Pet.App. A.2.)[2]

B. Proceedings and Disposition in the Minnesota State Courts.

The Federal Court 42 U.S.C. § 1983 action concerned prior proceedings in the Minnesota State Courts.

On June 3, 1988, Petitioners commenced an action against the Respondent Bank in the Minnesota State District Court, Morrison County, Minnesota. Seventeen

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[1] Petitioners' unsupported reference to this motion as "untimely" is denied. (Petition, p.3.)

[2] Petitioners' reference to conversations with the clerk's office are unsworn. The purpose for their inclusion in the Petition is unclear. (Petition, p.3.)

causes of action were advanced by Petitioners over the course of two years. There were 17 hearings, 12 on unsuccessful motions by the Petitioners.

In May 1990, after lengthy discovery, Respondent Bank prepared a motion for summary judgment. Petitioners voluntarily dismissed eight claims. The Respondent Bank again moved for summary judgment and on July 11, 1990, a hearing was held.

On July 12, 1990, the Trial Court Judge, Timothy J. Baland, initiated a telephone call to Jean Didier, counsel for the Respondent Bank. (Pet.App. A.25). The Judge at that time was (1) trying to locate a document referenced by both counsel at the July 11 Summary Judgment hearing; and (2) trying to determine whether the Respondent Bank agreed with Petitioners' contention (made at the hearing) that Petitioners' claims against the Respondent Bank had been abandoned in the Petitioners' bankruptcy. (*Id.*). Counsel for the Respondent Bank agreed, as the Trial Court points out at pages 6-7 and 11-12 of its December 10, 1991 Order (Resp. App. A.1) that Petitioners' abandonment in bankruptcy was final. While the discussion dealt with a substantive[3] albeit minor, aspect of the case, the finality of abandonment determination inured to the benefit of the Petitioners; if the abandonment was not final, the dispute would have been in the bankruptcy court, not state court. (Resp. App. A.12-14).

On July 19, 1990, the Court granted the Respondent Bank's Motion for Summary Judgment on all counts.

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[3] Respondent uses the term "substantive", as compared to "procedural."

Later, Respondent Bank moved for sanctions. At the sanctions hearing on September 17, 1990, Petitioners' counsel first raised the issue of the allegedly improper ex parte contact. Petitioners' counsel found an entry in Respondent Bank counsel's computer time records regarding the call from the Trial Court. Mr. Pinotti stated:

> "Then I look at it and I see here on the day after – where is it? The day after the motion for Summary Judgment there is an entry on here "telephone conference with Judge Baland's law clerk for an half an hour [sic]; Judge Baland for two hours [sic]; correspondence with Judge Baland a half an hour [sic]." I wasn't on any of those.
>
> * * *
>
> I haven't had a chance to go through this time record. And I think I – my clients have the right to confront the witness if we have to. And we still don't have a straight answer of what happened on July 12, why we weren't invited in the conversation, why there is – why the Respondent Bank is billing Mr. Radloff for a conversation that Ms. Didier had with you and your law clerk that I wasn't invited to. Why are we being billed for that? Why do we have to pay for that? *Assuming the thing was in bad faith.*"
>
> (Resp. App. A.3) (emphasis added).

Counsel for the Respondent Bank responded as follows:

> The reference Mr. Pinotti makes to our bill statement, which was filed by Ms. Didier on Friday of last week, is a reference to conversation that she had with the Court's clerk concerning collection of some documents for the Court's perusal following the Court's point.
>
> (Resp. App. A.3).

Petitioners at that point did not make any further motions to the Trial Court regarding the so-called ex parte contact.

After the September 17, 1990 hearing, Petitioners had 15 days before their appellate brief on the merits was due (the first track of appeals). No motion or special steps were taken before the Appellate Court at that point. (Resp. App. A.4).

Petitioners raised the issue before the Appellate Court for the first time in the text and at footnote 7 of their appellate brief on sanctions (the second track of appeals) claiming that the ex parte contact resulted in "a denial of both the client's and their counsel's due process rights to an impartial tribunal." *See* Appellant's Brief at 23 n.7, *Radloff v. First American National Bank of St. Cloud*, 470 N.W.2d 154 (Minn. App. 1991); (Resp. App. A.4). The Court of Appeals did not address those claims. *Radloff v. First American National Bank of St. Cloud*, 470 N.W.2d 154 (Minn. App. 1991); (Resp. App. A.18).

Thereafter, in separate Petitions for Rehearing to the Minnesota Supreme Court on the merits and on sanctions, the Petitioners specifically raised the denial of due process and access issues to the Trial Court, requesting the Minnesota Supreme Court review pursuant to Rule 117, Minn. R. Civ. App. P. (Resp. App. A.34, 39, 45, 48). All Petitions were denied, including *specific requests* by Petitioners to permit additional reply or, alternatively, to strike an Affidavit of Jean M. Didier explaining the nature of the allegedly improper ex parte contact (Resp. App. A.53, 54).

Petitioner sought United States Supreme Court review of the first track of appeals (on the merits). That Petition for Writ of Certiorari was denied on October 7,

1991. A subsequent Petition for rehearing was denied on December 9, 1991. *See Radloff v. First American National Bank of St. Cloud, N.A.*, 502 U.S. 858 (1991), *reh'g denied*, 502 U.S. 1009 (1991).

In September 1991, Petitioners moved the Trial Court to remove itself and to vacate the two judgments, raising the constitutional arguments as the bases. On December 9, 1991, a hearing was held. The Trial Court denied these motions, reasoning in the alternative that: 1) it lacked jurisdiction over a matter not properly preserved at the trial and appellate levels; and 2) no actual prejudice resulted from the allegedly improper ex parte contact. The Trial Court in great detail explained its reasoning under both theories. (Resp. App. A.1). Petitioners appealed (the third track), and the Court of Appeals denied review in an Order dated February 4, 1992 stating: 1) an Order Refusing to Vacate was not appealable as of right and 2) "[a]ppellants' failure to preserve the [constitutional] issues for this Court's determination in the second or third appeals precludes further review. *See, Mattson v. Underwriters at Lloyds of London*, 414 N.W. 2d 717, 721 (Minn. 1987)." (Resp. App. A.55). The Minnesota Supreme Court denied review by Order dated April 1, 1992. (Resp. App. A.57).

C. Misstatements of Fact in Petitioners' Statement of Case

The Petition contains numerous factual statements which Respondent Bank denies. These statements rely on inappropriate reference to the record, as is readily apparent. The following is a partial list of these misstatements of the evidence:

1. "On July 12, 1990, Judge Baland initiated a substantive ex parte hearing with the bank." (Petition, p. 4.)

2. "In response to Radloffs' petition to the Minnesota Supreme Court on the 'sanction' case, Bank's counsel on June 21, 1991, finally revealed substance was discussed in the July 12, 1990, ex parte hearing. A17." (Petition, p. 5.)

3. "This ruling shows that Judge Baland knew that his initiation of the ex parte contact violated the constitution, when he discussed substance on July 12, 1990." (Petition, p. 5.)

4. "The June 21, 1991, affidavit did not itself admit that substance was discussed on July 12, 1990, but the morsel of fact stated fully indicated to all involved that a major issue was communicated. See, Judge Baland's Dec. 9, 1991 statement, A27." (Petition, p. 5.)

5. "What has been disclosed, concerning the ex parte hearing, is that Judge Baland initiated the hearing to determine, allegedly, the legality and finality of Radloffs' right to sue Bank for pre-bankruptcy wrongs. A17." (Petition, p. 6.)

6. "Echoing the content of the July 12, 1990, ex parte hearing Judge Baland not only 'found' that Radloffs' representations [to the bankruptcy trustee] were "false, they knew it"; but he granted practical immunity to Bank for all the wrongs it committed against Radloffs. A30." (Petition, p. 6.)

7. "More alarming is that the finality of Radloffs' right to sue Bank for the pre-bankruptcy claims was completed more than six (6) months prior to Judge Baland's, July 12, 1990, ex parte hearing. A39." (Petition p. 6.)

8. "Only after the ex parte consultation, did Judge Baland make his biased proclamation." (Petition, p. 7.)

9. "In sum, this state case was one of extremely intentional misconduct by Bank, which has been buried by the bias of the state court judge." "Deception has occurred when the state court judge initiated at least one substantive ex parte hearing, acquiesced in a knowingly false disclosure by Bank's counsel on September 17, 1990, and then refused to allow Radloffs' jurisdiction of the court to correct it. A19." "His bias so permeated the state court proceedings so as to poison the entire process." (Petition, p. 8)

10. "Judge Baland would admit (15 months later in his December 9, 1991, order) that Mr. Hughes' disclosure did not reveal that matters of substance were discussed. A27." (Petition, p. 4.)

11. "The matters discussed were manifested in the July 19, 1990, opinion written by Judge Baland, finding, on summary judgement no less, that Radloffs' representations were false, and they knew it." A31. (Petition, p. 5.)

12. "The Bank's false representations, coupled with the state judge's silent acquiescence, deceived the Radloffs." (Petition, p. 5.)

13. "Bank also had contact with appellate Judge Jack Davies (who later authorized the opinion published at 470 N.W.2d 154). Before he was appointed to the appeals court bench, Bank asked Judge Davies for advice on a question involved in the first appeal, 455 N.W. 490." (Petition, p. 5.)

14. "Respondent Linda Sinotte is sued only in her official capacity for she failed to record the existence of the July 12, 1990, to keep minutes of the ex parte meetings that occurred." (Petition, p. 6.)

15. "One additional known contact occurred on February 9, 1990, (the content of which is still unknown despite Radloffs' requests)." (Petition, p. 6.)

16. "None of Radloffs claims survived and bank's chemical attacked [sic] against Radloffs crops was dispensed with deliberate ignorance." (Petition, p. 6.)

17. "The state court litigation was commenced on June 3, 1988. Bank asked the interim trustee to intervene. After the pleadings were reviewed and consultation with the United States Trustee, the interim trustee decided not to intervene." (Petition, p. 6.)

18. "Bank had a year and a half to contest the interim trustee's transfer of the estate's right to sue the bank, and did nothing." (Petition, p. 6.)

19. "The trustee sold Radloffs the right to sue Bank before Bank chemically attacked and destroyed Radloffs' asparagus crop, which was the original impetus for the state court action, A42." (Petition, p. 6.)

20. "Bank's purpose was to prevent the Radloffs from acquiring the crops and competing with them in the marketplace. A28, 40-41. Bank's admitted motive was to prevent Radloffs from acquiring and selling the crop in competition with Bank in the marketplace. A 28." (Petition, p. 7.)

21. "All 35 acres were killed or rendered commercially worthless, verified by Radloffs' expert. These asparagus crowns were perennial crops (lasting 15 - 20 years) and the net present value calculated by an agricultural economic expert to be worth over $500,000. The chemical attack was admitted and the value of the entire crop uncontested. Bank did claim a disputed interest in 25 of the 35 acres, but Radloffs had an uncontested right to at least 10 acres." (Petition, p. 7.)

22. "Bank, became a competitor of Radloffs by taking or withholding up to $53,000 of Radloffs' money and transferring at least $10,000 of it to their co-conspirator Mr. James Ambuehl. Bank with Ambuehl formed or operated several companies and, through such economic coercion, took over Radloffs' agri-business. Eventually First Farm, (bank's alter ego) became active in the asparagus market. On May 15, 1986, Bank's right to harvest twenty-five of the thirty-five acres expired. By that time very little (about 1 acre) of the asparagus crop was harvested. Bank demanded an extension and Radloffs initially refused. Then Bank, through its same co-conspirator Mr. Ambuehl, threatened Mr. Radloff with

physical harm. Bank then secretly paid Ambuehl $9,215.00 for services rendered. Due to the threat, Radloffs agreed to extend the 25-acre lease to expire on midnight May 27, 1986. On the evening of the last day of this coercively extended 25-acre lease, Bank had all 35 acres of asparagus drenched with a deadly combination of Roundup 2 (a contact killer) and crop oil (an inoculant)." (Petition, p. 7.)

23. "When these asparagus crowns are transplanted into production beds, every acre of crowns expands to 7 acres of plants producing spears for 12 to 15 years. Bank effectively destroyed 250 acres of production asparagus." (Petition, p. 7.)

24. "On July 18, 1986, Bank threatened to 'chemically burn' (Petition, p. 8) more asparagus crops. This threat was renewed in July 1987. A seller was influenced by such threat to convey the property (previously owned by Radloffs) to Bank; despite Radloffs' higher bid, which would have closed before Bank's. A46."

Petitioners repeatedly characterize Judge Baland's telephone calls as a "substantive ex-parte hearing" (Petition P.4-7). The term "substantive" is used in the context of "substance" and "prejudice". Yet, as Federal District Court Judge Rosenbaum stated: "Remarkably, other than a recitation of the fact of the *ex-parte* communication, the Plaintiffs have never, from the date of this first reference until this date, stated or even suggested any actual prejudice which may have resulted from the call". *See* (Pet.App.A.18)

To the extent "finality" of the abandonment of claims in the bankruptcy was discussed during the telephone call, (Pet.App.A.26), this was an issue of law regarding the application of judicial estoppel, *see Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3rd Cir. 1988), *cert. denied*, 488 U.S. 967 (1988), which was reviewable on appeal from the trial court's summary judgment. Instead, Petitioners, without support in the record, attempt to fashion this contact into an argument that the trial court's "bias so permeated the State Court proceeding so as to poison the entire process" (Petition, p. 8). In support of this, Petitioners recite unsupported slurs on the Trial Court Judge, parties, counsel for the Respondents and others. Petitioners' Statement of Case sets forth the same litany of "conspiracy", "bias" "aerial attacks on asparagus crowns" and "threats" that have been presented to every previous court in this matter.

REASONS FOR DENYING THE WRIT

I. Introduction

A writ in this case is neither necessary nor warranted because there exists no special and important reasons for the exercise of the Supreme Court's discretionary power of review. The Eighth Circuit Court of Appeals did not decide an important question of federal law which has not been, but should be, settled by the Supreme Court, nor did it decide a federal question in a way that conflicts with applicable decisions of the Supreme Court.

II. There is no important Federal Question which has not been settled by the Supreme Court or which has been decided in a manner which conflicts with Supreme Court decisions.

A. The Federal District Court and the Eighth Circuit Court of Appeals correctly applied the *Rooker-Feldman* doctrine to this case.

This case is disposed of under the established *Rooker-Feldman* doctrine, as explained recently in *Keene Corp. v. Cass*, 908 F.2d 293 (8th Cir. 1990); see also, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The *Rooker-Feldman* line of cases teaches that Federal District Courts may not sit in review of state court judgments. As succinctly stated in *Keene*, "[w]here a litigant attempts to circumvent the requirement of seeking direct review in the United States Supreme Court by casting her lawsuit as a Section 1983 action, *Feldman*'s jurisdiction bar applies." *Keene*, 908 F.2d at 297 (citations omitted).

In *Feldman*, the Court held that a Federal Court may not review a constitutional challenge to a state court judgment if the challenge is "inextricably intertwined" with claims asserted in the state court proceeding. 460 U.S. at 482 n.16. Under *Feldman*:

> [T]he federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was

> wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment.

Keene, 908 F.2d at 296-7, *quoting Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J. concurring).

Here, Petitioners' arguments are entirely premised on the fact that, in their view, the Minnesota State Courts wrongly decided the issues before them. The ex parte contact issue, along with the claimed denial of due process, infringement of the right to free access to the courts and misrepresentation by a party to the court, were raised to the Minnesota Appellate and Supreme Courts by Petitioners in appeals on the merits and sanctions. The constitutional issues and any review of them are inextricably intertwined with the state court proceedings.

Petitioners claim they had no meaningful opportunity to be heard on the issues and therefore the *Rooker-Feldman* cases do not apply, but the Petitioners did raise their constitutional claims in the proceedings in state court. That the Minnesota courts found them meritless does not change the analysis. As was stated in *Leaf v. Supreme Court of State of Wisconsin*, 979 F.2d 589, 599 (7th Cir. 1992):

> "There is no requirement that the state court allow a party to fully develop a claim that the state court determines is frivolous and without merit. To the contrary, when a court labels a contention as without merit, it has considered the claim in rendering its ensuing judgment, and a rejection of such claim becomes part of the judgment."

Leaf, 979 F.2d at 599 (discussing *Rooker-Feldman* doctrine). *See also, Hermandad v. Monge*, 613 F. Supp. 96, 101 (D.C. P.R. 1985) (asserting that *Feldman* applies to plaintiff who assails constitutionality of statute or rule for the first time in motion for reconsideration before appeals court).

Moreover, these issues were also raised in a totally separate track of hearings and appeals through a motion to vacate. The state court judge denied Petitioners' request on alternate grounds – that it lacked jurisdiction and that the claim had no merit. The Minnesota Court of Appeals dismissed the appeal on the jurisdictional ground. The Minnesota Supreme Court denied review. This particular determination was then appealable to the United States Supreme Court. *See*, 28 U.S.C. § 1257 (Law. Co-op. 1988). As was stated in *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986):

> [J]urisdiction does not depend * * * on the proceedings having gone to final judgment in the usual sense, for a litigant who is stymied by a procedural rule from which he cannot appeal can ask the U.S. Supreme Court to review that ruling; it is the final decision rendered "by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257; see Stern, Gressman & Shapiro, Supreme Court Practice, §§ 3.14-15 (6th ed. 1986). Nor does the Supreme Court's jurisdiction depend on whether the State Court addressed the question; it is enough that a federal claim was made and not accepted.

Lynk, 789 F.2d at 564 (citations omitted). Having failed to avail themselves of this procedure, Petitioners' claims in the Federal District Court are barred.

The upshot of Petitioners' arguments to this Court is that numerous state court decisions would have to be reopened and reexamined. Not only the State Court's decision to deny jurisdiction over issues not properly raised, but also the merits and sanctions judgment would be subject to vacation. This the Federal District Court is not empowered to do and its Order, on appeal to this Court, was appropriate.

B. The Federal District Court and the Eighth Circuit Court of Appeals correctly applied the doctrine of res judicata to this case.

Although closely related to the jurisdiction issue discussed *supra*, an alternative basis for dismissal is found in the concepts embodied in res judicata.[4]

Petitioners claim that they were somehow precluded from bringing in state court the due process right to access and misrepresentation claims alleged here. Petitioners are not being candid with the Court. While it is true Petitioners have been precluded, in part, from litigating these issues on jurisdictional grounds, it has been a problem of their own making.

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[4] Federal Circuits have analyzed the relationship between *Rooker-Feldman* and res judicata in various ways. *Compare Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir.) *vacated on other grounds*, 477 U.S. 902, 106 S. Ct. 3269 (1985) (res judicata and *Feldman* analysis are "two sides of the same coin") *with Leaf*, 979 F.2d at 600 (separate res judicata and *Rooker-Feldman* analyses). In *Feldman*, the Court declined to reach the defendant's res judicata argument, remanding it for consideration by the District Court. *Feldman*, 460 U.S. at 487-88.

The record is replete with Petitioners' attempts to raise these issues in the Minnesota States Courts. The issues were not, however, properly preserved at the State Court level. In *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717 (Minn. 1987), the Minnesota Supreme Court outlined the process for preserving issues discovered while appeal is pending. Petitioners could have:

1. Sought relief on account of the allegedly improper *ex parte* contact from the trial court.

2. Moved in the Court of Appeals for a remand on that issue; or

3. Explained the situation to the Court of Appeals and sought reservation of jurisdiction on any issues raised by the allegedly improper *ex parte* contact.

Id. at 721-722.

Instead of raising the issues as prescribed by *Mattson*, the Radloffs specifically raised the issues in the Appellate Courts under Minn. R. Civ. App. P. 117. When the Appellate Court did not address or remand the issues, they became final. *Mattson*, 414 N.W.2d at 720.

Federal Courts apply the res judicata law of the applicable state to federal actions commenced after the conclusion of the State Court action. "[A] federal court must give to a state court judgment the same preclusion effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75,

81 (1984)[5]; *Tancrel v. Mayor and Council of Bloomfield T.P.*, 583 F. Supp. 1548 (D. N. J. 1984). *See also*, 28 U.S.C. § 1738 (Law. Co-op. 1989) (full faith and credit statute requires federal courts to respect state judgments).

This Court need not look any further than the law cited by the Minnesota Court of Appeals in this case. The State Appellate Court did not simply deny review without comment. It cited the *Mattson* case, which bars relitigation of the issues in the Minnesota Courts. *See also*, *Mattson*, 414 N.W.2d at 720 ("the scope of the finality of the appellate decision depends on what the Court intends to be final, and this is determined by what the Court's decision says."). These concepts have been reiterated recently by the Minnesota Supreme Court:

> A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every other matter which was actually litigated, but also as to every matter which might have been litigated therein.

Dorso Trailer v. American Body & Trailer, 482 N.W.2d 771, 774 (Minn. 1992), *quoting Mattsen v. Packman*, 358 N.W.2d 48, 49 (Minn. 1984).

The Federal District Courts simply cannot address the issues raised and disposed of in the Minnesota State Courts.

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[5] Petitioners incorrectly cite *Migra*, for exactly the opposite proposition. Perhaps this gives rise to Petitioners' claim of the conflict of the judgment appealed from with applicable decisions of the Supreme Court.

CONCLUSION

For the foregoing reasons, Respondents First American National Bank of St. Cloud, N.A., and First Farm Corporation, Inc. of St. Cloud request that this Court deny the Petition for Certiorari.

Dated: February 17, 1995

Respectfully submitted,

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STATE OF MINNESOTA COUNTY OF MORRISON	IN DISTRICT COURT SEVENTH JUDICIAL DISTRICT
Steven I. Radloff and Barbara Radloff, Plaintiffs, vs. First American National Bank of St. Cloud, N.A.; and First Farm Corporation, Inc. of St. Cloud, a Minnesota Corporation, Defendants.	ORDER Court File No. C3-88-455

The above-entitled matter came on for hearing the 9th day of December, 1991, at the Courthouse in the City of Little Falls. Plaintiffs, who were personally present, were represented by their attorneys, Michael A. Pinotti and John Thomas. Defendants were represented by their attorneys, Kevin J. Hughes, Jean M. Didier and Paul Harris.

Having heard and considered the arguments of counsel, having reviewed and considered the documents that were filed in support of or in opposition to the motion, being fully advised in the premises, and on all the files, records and proceedings herein, the Court now makes the following:

ORDER

1. Radloffs' motion seeking entry of an Order for my removal from the case pursuant to Minn. R. Civ. P. 60.02-.03 is denied.

2. Radloffs' motion seeking entry of an Order vacating the Judgment dated July 19, 1990 is denied.

3. Radloffs' motion seeking entry of an Order vacating the Judgment dated October 1, 1990 is denied.

4. Radloffs' motion seeking entry of an Order vacating an Order dated May 31, 1990 is denied.

5. The attached Memorandum is incorporated into and made part of this Order.

Dated this 9th day of December, 1991.

/s/ Timothy J. Baland
TIMOTHY J. BALAND
Judge of District Court

MEMORANDUM

A. PERTINENT FACTS

Mr. and Mrs. Radloff appealed three different trial court decisions. Those three decisions were the May 31, 1990 decision regarding Judicial Notice; the July 19, 1990 decision regarding Summary Judgment; and the October 1, 1990 decision regarding sanctions. Radloff's attorney was required to submit his appellate brief on the appeal of the first 2 trial court decisions by October 3, 1990 or thereabouts. The trial court hearing on the bank's request

for sanctions took place on September 17, 1990. So far as I am aware, the first expression of concern by Radloff's attorney regarding allegedly improper *ex parte* contact by the trial court with the bank's attorney occurred at that time.

This is what Mr. Pinotti said:

> Then I look at it and I see here on the day after – Where is it? The day after the Motion for Summary Judgment there is an entry on here "Telephone conference with Judge Baland's Law Clerk for a half an hour; Judge Baland for two hours; correspondence with Judge Baland a half an hour." I wasn't on any of those.
>
> * * *
>
> I haven't had a chance to go through this time record. And I think I – My clients have the right to confront the witness if we have to. And we still don't have a straight answer what happened on July 12, why we weren't invited in the conversation, why there is – why the Bank is billing Mr. Radloff for a conversation that Ms. Didier had with you and your Law Clerk that I wasn't invited to. Why are we being billed for that? Why do we have to pay for that? *Assuming the thing was in bad faith.*

See Bank's Exhibit A, p. 3 and p. 6; (emphasis added). Mr. Hughes' response, on behalf of the Bank, was as follows:

> The reference Mr. Pinotti makes to our Bill Statement, which was filed by Ms. Didier on Friday of last week, is a reference to conversation that she had with the Court's Clerk concerning collection of some documents for the Court's perusal following the Court's point.

Bank Exhibit A, p. 5. This is all that was said, by either side, regarding any allegedly improper *ex parte* contact at the sanctions hearing. Until the motion now under consideration was served and filed, the September 17, 1990 comments by Mr. Pinotti constituted *the only* attempt or effort made by Radloff to raise *at the trial court level* an issue based upon the allegedly improper *ex parte* contact.

Mr. Pinotti made passing reference to the allegedly improper *ex parte* contact in a footnote on the last page of his brief in Radloff's appeal of the trial court's sanctions decision. See p. 32 in Bank Exhibit A. Radloffs did not raise the issue in their brief on the appeal of the trial court's summary judgment decision, even though 15 days went by between September 17 and October 3, the date on which that brief was submitted to the Court of Appeals. Radloffs likewise took no special steps during the entire time that the summary judgment decision was pending before the Court of Appeals to seek relief on account of the allegedly improper *ex parte* contact from that Court.

Radloffs have petitioned the Minnesota Supreme Court on three different occasions for a hearing, and for relief, on account of the allegedly improper *ex parte* contact. See Bank Exhibit A, pp. 7-10; 11-15; 16-17a; 18-21. All three petitions for review or reconsideration were denied by the Minnesota Supreme Court. The U.S. Supreme Court has also denied certiorari.

B. ANALYSIS, REASONS FOR DECISION

1. Jurisdiction.

Radloffs have moved to vacate the trial court judgments previously entered, and simultaneously seek my removal pursuant to Minn. R. Civ. P. 63.02 – 03. However, since Radloffs have exhausted their rights of appellate review, the threshold question presented by their present motions is whether the trial court has jurisdiction.

Here, as in *Matson v. Underwriters at Lloyds*, 414 N.W.2d 717 (Minn. 1987), "the question . . . is one of the finality of appellate judgments." 414 N.W.2d at 720. Here, as in *Matson*, and during the pendency of the appeal of the summary judgment decision or during the pendency of the appeal of the sanctions decision, the Radloffs could have:

a) sought relief on account of the allegedly improper *ex parte* contact from the trial court, or

b) moved in the Court of Appeals for a remand on that issue, or

c) explained the situation to the Court of Appeals and sought reservation of jurisdiction on any issues raised by th [sic] allegedly improper *ex parte* contact.

See discussion in *Matson* opinion on p. 721. Radloffs did none of the things suggested as options in *Matson*. Instead, they chose to pursue the matter under Minn. R. App. P. 117. When they did so, they left themselves "vulnerable" (to use the term found in *Matson*) to a finality determination as was reached in *Matson*.

Radloffs could have taken steps in either appeal to preserve trial court jurisdiction on issues raised by the allegedly improper *ex parte* contact. They chose not to do so. The trial court judgments have become final, either as entered (summary judgment decision), or as modified (sanctions decision). The trial court is without jurisdiction to hear, consider or decide Radloffs' present motions.

2. The Merits of the Present Motions.

I recognize the possibility that I may be wrong in my analysis of the jurisdiction question. For that reason, and to (hopefully) bring this protracted litigation to a final conclusion, I will proceed to address the merits of Radloffs' present motions. I note in passing that the same approach was employed by the trial judge in *Matson*.

3. Motion to Vacate Prior Judgments.

To succeed on a motion to vacate a judgment, the moving party must establish entitlement to such relief under one of the provisions in Minn. R. Civ. P. 60.02. Here, as in *Regents of University of Minnesota v. Medical, Inc.*, 405 N.W.2d 474 (Minn. App. 1987), relief is not available on the ground that the trial judge should have been disqualified. See Rule 60.02(b) and discussion in Part B, Section 5c of this Memorandum.

Radloffs argue that their motion should be granted under clause (c) of Rule 60.02. But as was held in *Artz v. Artz*, 361 N.W.2d 135 (Minn. App. 1985), Rule 60.02(c) "is intended to correct mistake or inadvertence by a

party, . . . not to correct judicial error." 361 N.W.2d at 136. Thus, relief is not available under Rule 60.02(c).

Clauses (a), (d) and (e) of Rule 60.02 do not apply. Relief is likewise unavailable under the residual clause, Rule 60.02(f), which provides that the court "may relieve a party . . . from a final judgment . . . for . . . any other reason justifying relief. . . . " In *Chapman v. Special School District No. 1*, 454 N.W.2d 921 (Minn. 1990), the Minnesota Supreme Court reaffirmed prior holdings that relief under clause (f) is "available only under exceptional circumstances. . . . " *Id.* at 924. If the allegedly improper *ex parte* contact did not justify review by the Supreme Court, despite *three* separate requests for such review, it necessarily follows that the judgments themselves cannot be set aside on that ground. The facts here fall far short of being sufficient to constitute one of those "exceptional circumstances" where relief under Rule 60.02(f) would be proper.

4. The Nature of the Ex Parte Contact.

As the transcript of the July 11, 1990 summary judgment hearing reveals, I had concerns at that time about whether an effective, enforceable and legally valid "abandonment" by the bankruptcy trustee of its (Radloffs') claims against the Bank had ever occurred. See pp. 30-31 of Bank Exhibit A and pp. 9-11 of the transcript of the July 11, 1990 hearing. Mr. Pinotti responded to my remarks on this issue by calling my attention to local Bankruptcy Court Rule 115(b) and other authority which, he contended, made it clear that the "abandonment" had occurred in accordance with applicable rules and was

therefore final and binding. See Transcript of July 11, 1990 hearing at pp. 11-15. Mr. Hughes, for his part, responded as follows on this issue:

> With respect to the colloquy that just occurred between yourself and Mr. Pinotti, I think there may, there may be an issue about the interplay with the Federal Court cases and the local Bankruptcy Rules on the effect of abandonment, the legal effect of Trustee's actions on abandonment. I guess our position was that notwithstanding that – and you're right, that my [sic] be dispositive depending on the determination you make on the argument that Mr. Pinotti has just advanced –, the *Oneida* case is a four-square, four-corner understanding and implementation of the basic Commercial Law Doctrine that if you go to the United States Bankruptcy Court, that's where they handle the matter.

Id. at p. 15.

At the conclusion of the July hearing, there was uncertainty in the record and in my mind on whether the Bank agreed with Mr. Pinotti that compliance with local Bankruptcy Rule 115(b) meant that the abandonment was valid and final.

Despite my attempt on July 11 to have the location of the pertinent abandonment documents called to my attention (see pp. 6-9 of the July 11, 1990 transcript), I found, as I continued work on the case on July 12, that I was still having trouble locating the documents that I wanted to review. I believe I may also have been unable to locate a copy of the *Oneida* case to which Mr. Hughes had made reference in his presentation. I note that the Morrison County Law Library did not then carry the

Federal Reporter. At my direction, my law clerk contacted Ms. Didier for assistance in trying to obtain the documents or guidance on where they could be found in the Court file. Recall in this connection that some of the pertinent documents had been filed in support of or in opposition to a prior summary judgment motion heard by the Hon. Roger Klaphake, the judge to whom the case had been assigned prior to my involvement.

As Ms. Didier's affidavit of June 21, 1991 (Bank Exhibit A, pp. 22-25) reflects, she and I spoke about these matters on July 12. It was a brief conversation, a matter of a few minutes at most, not the two hours referred to by Mr. Pinotti. Ms. Didier's response to the questions I asked about the Bank's position on the validity of the abandonment effectively constituted acknowledgment that Mr. Pinotti was correct about the applicability of local Bankruptcy Rule 115(b).

In any event, I came to conclude, upon my independent review of the rules and cases which Mr. Pinotti had called to my attention, that the abandonment had been properly obtained, albeit pursuant to rules which did not require disclosure to the Bank that the abandonment was being sought. See discussion and analysis of this aspect of the case as set forth on pp. 9 through 16 of my Summary Judgment Memorandum, pp. 106-113 in Bank's Exhibit A.

5. The Law Which Applies to Ex Parte Contacts by the Court.

Canon 3.A.(4) of the Code of Judicial Conduct provides, in pertinent part, that a judge should "except as

authorized by law, neither initiate nor consider *ex parte* . . . communications concerning a pending proceeding." Common sense and common experience, as well as cases such as *Graham v. Special School District No. 1,* 472 N.W.2d 114, 119, n.6 (Minn. 1991), permit us to conclude that not all court-initiated *ex parte* contacts with counsel are impermissible or improper. Court-initiated *ex parte* contact regarding scheduling or other similar administrative, non-substantive matters appear to fall outside the parameters of Canon 3.A.(4). Since my request of Ms. Didier for assistance in locating or obtaining a document involved purely an administrative or "housekeeping" matter, my contact in that regard did not, in my judgment, violate the prohibition contained in Canon 3.A(4) of the Code of Judicial Conduct.

The same cannot be said for my questions of Ms. Didier regarding Bank's position on the finality or validity of the bankruptcy abandonment. Those questions dealt with substantive matters of fact or law. My inquiry into that subject matter, however innocent or well-intentioned, nonetheless constituted a violation of Canon 3.A.(4).

5. Does the Violation of Canon 3.A.(4) of the Code of Judicial Conduct which occurred in this Case Entitle Radloffs to Entry of an Order Vacating Either Judgment or Justify My Removal from the case under Minn. R. Civ. P. 63.02., 63.03?

a. The Summary Judgment Decision.

Mr. Pinotti's affidavit and memorandum contain a number of statements or assumptions which are not accurate. He proceeds, in part, on the theory that some request or demand was made of me to account for the *ex parte* contact that occurred on July 12, 1990 and he implies that I refused to respond. Until I received the documents transmitted with Mr. Pinotti's cover letter of November 7, 1991, I was unaware of (a) the existence of Ms. Didier's affidavit of June 21, 1991, or (b) that Radloffs had sought relief in the appellate courts on account of allegedly improper *ex parte* contact with Ms. Didier on my part. Nor had anyone called to my attention the remarks made by Mr. Pinotti at the July 11, 1990 summary judgment hearing, as quoted in Part A of this memorandum. Had *anyone* sought from me an explanation of the *ex parte* contact, it would be as is set forth in Part B, Section 3 of this memorandum.

Mr. Pinotti contends that "inquiry concerning this *ex parte* contact . . . was made to the court at the September 17, 1990 hearing." What Mr. Pinotti said at that hearing about the *ex parte* contact was quoted verbatim as the outset of this memorandum. His "inquiry" was limited. He raised two questions: why did the conversation occur without his knowledge or participation, and why were the Radloffs being asked to pay for Bank attorney time spent on that activity. Mr. Hughes, to the best of his ability, provided an answer to the first question at the time of the hearing. Those remarks are quoted verbatim at the outset of this memorandum. The second question

was answered in my sanctions decision of October 1, 1990.

As was previously noted, and as Ms. Didier's affidavit of June 21, 1991 makes clear, there was no 2 hour long conversation with the Court. It was a brief conversation, limited in time and scope, for which she put down (for the reasons noted in her affidavit) .2 hours of time in her file billing records.

The conversation about the Bank's position on the validity of the abandonment occurred in the context described in Part B, Section 3 of this memorandum. Yet in bringing the present motions, Mr. Pinotti made no effort to find out from me what had happened, or why. He assumed skullduggery or worse. That is what he has done from the outset. I note and emphasize Mr. Pinotti's final remark, made at the September 17, 1990 sanctions hearing, about the allegedly improper *ex parte* contact. He there made clear that his argument was all premised on the assumption that "the thing [*ex parte* contact] was [done] in bad faith."

That is the problem here. Mr. Pinotti has made assumptions, and then made accusations based on those assumptions. He has relied not on inquiry or facts, but on assumptions almost wholly divorced from reality. Given the true nature of the context in which the *ex parte* contact by the Court with Ms. Didier occurred, and given the nature of Ms. Didier's response to the substantive questions that were asked at that time, it is plainly evident that there is no basis for Mr. Pinotti's *assumption* of bad faith. It is likewise evident that the substantive *ex parte* contact which occurred does not provide a basis upon

which to vacate or set aside either of the judgments that have been entered.

Let me start by repeating two points already made. First, what happened here does not constitute one of those "exceptional circumstances" where relief under Rule 60.02(f) is appropriate. Second, Mr. Pinotti has raised the *ex parte* contact issue four different times with the appellate courts, and has not even been able to persuade those courts of the need for a *hearing* on the issue. If his allegations are insufficient to justify an appellate court hearing, they necessarily fall short of being sufficient to justify entry of an order vacating the judgments, which, incidentally, those same appellate courts have found to have been proper.

Mr. Pinotti also ignores two other salient points. First, the upshot of the substantive portion of the *ex parte* contact was receipt by the court of confirmation that the Bank's attorney *agreed* with Mr. Pinotti that the abandonment of Radloffs' claims against the Bank by the bankruptcy trustee had been validly obtained. The outcome of the substantive portion of the *ex parte* contact did not serve then to *prejudice* Radloffs, but rather, it worked to their *advantage*. Because the abandonment was valid, no consideration could be given to the possibility that the Bank was entitled to summary judgment on the ground that the Radloffs' right to sue was still vested in the bankruptcy trustee.

Second, Mr. Pinotti ignores the fact that the substantive portion of the *ex parte* contact had no bearing on the summary judgment decision. Any questions which I had about the *validity* or *finality* of the bankruptcy trustee's

abandonment of Radloffs' claims against the Bank were resolved in *Radloffs'* favor. The fact that the Radloffs obtained the bankruptcy trustee's abandonment of their claims against the Bank without ever giving the Bank notice of the fact that abandonment was being sought *was* pivotal in my summary judgment decision. See Section D of my Summary Judgment Memorandum. But the lack of notice is separate and distinct from, and only becomes significant *because* of, the validity and finality of the abandonment.

Because there was no connection of any kind between the substantive matter discussed in the *ex parte* contact and my consideration, analysis or decision of the Bank's summary judgment motion, there is no basis upon which to grant the relief sought by the Radloffs on their present motions. I point out in connection with this conclusion that Mr. Pinotti has not cited a single case where, on facts even remotely comparable to those present here, relief of the type here sought has ever been granted.

b. The Sanctions Decision.

No attorney's fees were ordered to be paid by either Mr. Pinotti or the Radloffs for time spent by Ms. Didier in connection with the *ex parte* contact. Given the fact, and for the reasons set forth in Part B, Section 5a of this memorandum, and because there was no connection of any kind between the substantive matter discussed in the *ex parte* contact and my resolution of the Bank's sanctions motion, there is no basis upon which to grant the relief sought by the Radloffs on their present motions.

c. Motion for Removal.

Radloffs have the burden of proof to demonstrate (that is, to make an affirmative showing) of *actual* prejudice or bias. *Baskerville v. Baskerville,* 75 N.W.2d 762 (Minn. 1956). The mere fact that the judge whose removal is sought has previously made a ruling in the case contrary to the position taken by the party who seeks the judge's removal is an insufficient basis to establish actual bias or prejudice. *Schack v. Schack,* 354 N.W.2d 871 (Minn. App. 1984). My July, 1990 ruling on the Bank's summary judgment motion was a function of my understanding of the facts and the requirements of the applicable law. The same is true for my decision on the sanctions issue. Both of those decisions were affirmed on appeal. Mr. Pinotti's disagreement (and/or frustration with) those decisions does not establish actual bias or prejudice under Rule 62.02 or 62.03.

The *ex parte* contact that occurred between myself and Ms. Didier on July 12, 1990 likewise fails to constitute a basis for my present removal from this case. I reiterate here the points made in Part B, Sections 3, 5a and 5b of this memorandum. There was no connection between the one substantive matter discussed in the *ex parte* contact and the decisions that were rendered. What I learned of substance from the *ex parte* contact worked to Radloffs' *advantage,* not their disadvantage. Here, as in *Nachsheim v. Wartnick,* 411 N.W.2d 882 (Minn. App. 1987), the violation of a provision in the Code of Judicial Conduct falls short of being a sufficient basis for removal. As was noted in *Wartnick*:

> Wartnick argues the trial court should have disqualified himself because his presiding over the trial violated Canon 3(C)(1) of the Code of Judicial Conduct. Even assuming the Canon applies, it is not a basis for disqualifying a judge: Rule 63.03 explicitly makes an "affirmative showing of prejudice" the exclusive ground for removing a judge.

411 N.W.2d at 890. The insufficiency of Radloffs' proof of actual bias or prejudice is documented and demonstrated by, among other things, the following:

a) their failure to raise the issue in an appropriate manner at the time the *ex parte* contact was first called to their attention;

b) the context in which the *ex parte* contact occurred, and the limited nature of the contact;

c) the fact that the information conveyed to the Court during the *ex parte* contact served to confirm Radloffs' position on the validity and finality of the bankruptcy trustee's abandonment of their claims against the Bank;

d) the absence of a connection between the *ex parte* contact and subsequent rulings by the trial court;

e) the fact that the same allegations made by the Radloffs in support of their motion for removal have been advanced, without success in the appellate courts.

Radloffs have not met their burden of proof to make an affirmative showing of actual bias or prejudice. I note in

passing that nothing in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1987), requires a different outcome. The provisions in 28 U.S.C. § 455 do not apply to state court trial judges, and our facts would not bring this case within § 455 even if it did apply.

C. CONCLUSION.

I regret and apologize for the improper *ex parte* contact. In hindsight, obviously, it would have been better if I had not spoken *ex parte* to Ms. Didier, or if I had immediately either called or written Mr. Pinotti to disclose the substance of the conversation. Had I followed up in either fashion, I would like to think that the present motions would not have been pursued. I would like to think that had prompt disclosure been made, the inconsequential nature of the *ex parte* contact would have been recognized by Mr. Pinotti and his clients.

Be that as it may, it is my view that once again Mr. Pinotti has (unfortunately) rushed to judgment; that he has, once again without sufficient investigation of the facts or research of the law, rushed in where angels fear to tread. Once again, Mr. Pinotti has sought to make a mountain out of a molehill. In litigation, as in life, that strategy seldom works. It is wholly ineffective here.

For the reasons set forth in this memorandum, Radloffs' motions have been, must be and are hereby denied.

TJB

Steven I. RADLOFF, et al., Appellants,

v.

FIRST AMERICAN NATIONAL BANK OF ST. CLOUD, N.A., et al., Respondents.

No. C6-90-2658.

Court of Appeals of Minnesota.

May 14, 1991.

Review Denied July 24, 1991.

Lender moved for award of attorney fees after summary judgment was entered against borrowers on all lender liability claims, including fraud, tortious interference with contract, breach of fiduciary duty, and wrongful repossession. The District Court, Morrison County, Timothy J. Baland, J., awarded attorney fees against borrowers and their attorneys, and appeal was taken. The Court of Appeals, Davies, J., held that: (1) attorney fee issue was "other matter" independent of merits of litigation and was not subject to stay of further proceedings in trial court during appeal, and (2) attorney fee award was permissible sanction.

Affirmed as modified.

See also, 455 N.W.2d 490.

1. Appeal and Error 490

Attorney fee issue was "other matter" independent of merits of litigation and was not subject to stay of further proceedings in trial court during appeal. 51 M.S.A., Rules Civ.App.Proc., Rule 108.03.

See publication Words and Phrases for other judicial constructions and definitions.

2. Appeal and Error 984(5)

Standard of review of decisions on attorney fees and costs is whether trial court abused discretion. M.S.A. § 549.21; 48 M.S.A., Rules Civ.Proc., Rule 11.

3. Costs 2

Good faith argument for a change in law excuses advancement of claim that is unwarranted under existing law and that would otherwise warrant sanctions. M.S.A. § 549.21.

4. Costs 2

Conduct is measured by objective standard under Rule 11 and attorney fee statute; sanctions are not appropriate merely because party does not prevail on merits. M.S.A. § 549.21; 48 M.S.A., Rules Civ. Proc., Rule 11.

5. Costs 2

Attorney fee award of $22,037 to be paid by borrowers and their attorney to lender was warranted by serving lender to obtain jurisdiction over two entities separate from lender, improperly listing entities as defendants, bringing Racketeer Influenced and Corrupt Organizations Act (RICO) claim without factual basis to prove criminal activity by lender, violating trial court deadline for adding parties, bringing claims for negligent infliction

of emotional distress and concomitant physical effects without linking lender's commercial activities with borrowers' medical problems, repeatedly arguing that trial court should take judicial notice of 22-year-old criminal conviction of one of lender's witnesses, alleging tort theory of breach of duty of good faith or fair dealing, and withdrawing eight claims after lender prepared summary judgment memorandum. M.S.A. § 549.21; 48 M.S.A., Rules Civ.Proc., Rule 11; 18 U.S.C.A. § 1961 et seq.

6. Torts 6

There is no tort cause of action for breach of duty of good faith or fair dealing.

7. Attorney and Client 24

Costs 2

Claim of borrowers and their attorney that they would have disclosed intent not to pursue certain claims had they been asked directly was not defense for failure to make timely disclosure and did not relieve them of liability for attorney fees for dismissing claims after lender prepared summary judgment motion. M.S.A. § 549.21; 48 M.S.A., Rules Civ.Proc., Rule 11.

8. Costs 2

Borrowers whose claims against lender were dismissed prior to trial could not recover attorney fees on basis of lender's alleged misrepresentation that borrowers contested lender's right to set off adverse jury award against balance of loan discharged in bankruptcy.

9. Attorney and Client 24

Costs 2

Summary judgment orders and numerous other orders denying relief to borrowers were ample warning to alert borrowers and their attorney that they could be subject to sanctions; explicit warning was not required. M.S.A. § 549.21; 48 M.S.A., Rules Civ.Proc., Rule 11.

Syllabus by the Court

Sanctions are justified where the party and attorney advance multiple theories that are factually and legally unwarranted.

Michael A. Pinotti, Roseville, John E. Thomas, St. Paul, for appellants.

Kevin J. Hughes, Jean M. Didier, Hughes, Thoreen, Mathews & Knapp, St. Cloud, for respondents.

Considered and decided by DAVIES, P.J., and LANSING and MULALLY,* JJ.

OPINION

DAVIES, Judge.

Respondent bank, after being vindicated of any lender liability by summary judgment on all claims,

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*Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn.Const. art. VI, § 2.

moved the trial court for attorney fees and costs under Minn. Stat. § 549.21 and Minn.R.Civ.P. 11. The trial court sanctioned appellants and their attorneys by awarding attorneys fees of $22,037. We modify the award of fees and affirm.

FACTS

This lawsuit in the context of a farmer-lender dispute. Plaintiffs Steven and Barbara Radloff alleged the First American National Bank of St. Cloud (bank), by various acts, forced them into bankruptcy in 1985, wrongfully destroyed 25 to 35 acres of asparagus crowns in 1986, and interfered with their purchase of a farm in 1987.

More than 17 causes of action were advanced by Radloffs during these proceedings. After the bank had prepared its May 1990 memorandum in support of its motion for summary judgment, Radloffs voluntarily dismissed eight claims. The complaint was amended twice to add additional claims. During the proceeding, the trial court denied Radloffs' motion to add a RICO claim and an additional defendant. The court also dismissed a claim for personal injury and actions against two separate defendants. There were 17 hearings, 12 on unsuccessful motions by the Radloffs.

Nine separate causes of action survived after the voluntary withdrawal of claims: fraud, duress, tortious interference with contract or business advantage, violation of the bank holding company act, restraint of trade, outrage, trespass, breach of fiduciary duty, and wrongful repossession. On July 19, 1990, the trial court granted summary judgment for the bank on each of the nine

claims, and this court affirmed on February 5, 1991. Radloffs' petition for review was denied on March 27, 1991.

On October 2, 1990, while the appeal to this court was pending, the trial court, upon the bank's motion, awarded attorney fees of $22,037 against Radloffs and their attorneys, collection of which was stayed until after the disposition of any appeals.

ISSUES

I. Was it lawful to award attorneys fees while the underlying action was on appeal?

II. Did the trial court abuse its discretion in ordering attorney fees to be paid by Radloffs and their attorneys?

III. Did the trial court abuse its discretion in not awarding attorney fees to the Radloffs?

IV. Was adequate notice given that sanctions could be imposed?

ANALYSIS

Several threshold matters must be addressed initially. We first note that costs and disbursements of $6,104.37 were assessed against the Radloffs. The costs are not being appealed as unreasonable, however, so we decline to comment on them. *See* Minn.Stat. § 549.04 (1988).

Next we consider the propriety of this appeal by Radloffs' attorney, Michael A. Pinotti, when he neither intervened to become a party in this case nor filed a separate appeal. Had he filed a separate appeal, it could

have been consolidated with this appeal for purposes of efficiency. While we do not advocate bypassing proper procedures, we will, to move this protracted litigation along, allow Pinotti's appeal in conjunction with the Radloffs' appeal.

I.

Trial Court Jurisdiction

[1] Radloffs' motion to postpone the trial court hearing on fees and costs until the appeals had run their course was denied by the trial court. We affirm the trial court on this matter. Minn.R.Civ.App.P. 108.03, which stays further proceedings in the trial court during appeal, was inapplicable because the attorney fees issue was an "other matter," independent of the merits of the litigation. Moreover, all of the requests for sanctions related to causes of action that were not on appeal. The policy of efficiency was served, as it was anticipated that any appeal of the fees could be consolidated with the then pending appeal of the merits of the action. This procedure is consistent with *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825-26 (Minn.1984), where a trial court retained jurisdiction to award attorney fees while the substantive issues of the case were on appeal. We adopt this rationale for upholding trial court jurisdiction to award fees. *See Seiberlich v. Burlington N.R.R. Co.*, 447 N.W.2d 896, 899 (Minn.App.1989) (trial court retained jurisdiction to award trial costs while case was on appeal because they were "collateral and supplemental to decision on the merits"), *pet. for rev. denied* (Minn. Jan. 12, 1990).

Additionally, we note that there was minimal prejudice to the Radloffs, as collection of the judgments for attorney fees and costs was stayed pending the disposition of any appeals.

Now, to the merits.

II.

Award of Attorney Fees to the Bank

[2] The standard of review of decisions on attorney fees and costs under both Minn.Stat. § 549.21 (1988) and Minn.R.Civ.P. 11 is whether the trial court abused its discretion. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn.1982); *Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn.1990).

The trial court awarded attorney fees under both section 549.21 and rule 11 without specifically differentiating between their respective grounds for sanctions. Considering the similarity between the statute and rule, that was not an abuse of discretion.

[3] Section 549.21 requires bad faith, a frivolous claim which increases the opponent's costs, an unfounded position taken to delay the action or harass the opponent, or fraud upon the court. A good faith argument for a change in the law excuses the advancement of a claim unwarranted under existing law.

Under rule 11, before signing a document, the attorney or party has an affirmative duty reasonably to investigate the factual and legal bases of claims made in the document to determine that they are well grounded and not made for an improper purpose, such as to harass, or

increase the costs of, the opponent, or to delay the proceedings. "[A] good faith argument for the extension, modification, or reversal of existing law" excuses a claim not supported by existing law. If there are violations under rule 11, sanctions are mandatory.

[4] Under both the statute and the rule, conduct is measured by an objective standard. *See Uselman*, 464 N.W.2d at 140, 142-43. Sanctions are not appropriate merely because a party does not prevail on the merits. *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 118 (1988). The filing of excessive pleadings or motions may constitute an improper purpose. *Id.* at 121. "[T]he extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or * * * law" is an aggravating factor. *Id.* at 125-26; *see Uselman*, 464 N.W.2d at 146 (Simonett, J., concurring specially).

[5] The conduct of the appellants in this case deserves sanction under the standard of the *Uselman* case. The award of attorneys fees was justified for the purpose of deterring such conduct. Here, the behavior of the appellants in asserting multiple baseless causes of action resulted in increased costs for all parties and distracted the attention of the court from any theories that might possibly have had some merit. The conduct of appellants throughout frustrated the expeditious pursuit of justice.

Uselman instructs us that the purpose of sanctions is to deter violators, rather than to punish or to compensate, but to avoid chilling imaginative litigation, "[t]he court should impose the least severe sanction necessary to

effectuate the purpose of deterrence." *Id.* at 145. In conjunction with this policy, the court should "consider the attorney's or party's ability to pay." *Id.*

The sanctions in this case were ordered by the trial court before *Uselman* was decided. We note, however, that, although there was evidence that total fees incurred by the bank were $172,000, the trial court awarded fees of only $22,037. The amount reflects both the policy of deterrence and respect for differing capacities to pay.

The trial court divided the sanctionable incidents into eight categories. We find no abuse of discretion in the trial court's sanctioning both Radloffs and attorney Pinotti in connection with any category, but as to category E we reduce the amount.

A. Defective Service of Process

Appellants served the bank to obtain jurisdiction over two entities separate from the bank. They made incorrect assumptions about the relationship of the bank to the two entities, and advanced various unsupportable legal theories to validate the service. Thereafter, appellants improperly listed the two entities as defendants in the case caption. Later they consented to an order dismissing the entities from the lawsuit. The trial court faulted their investigation into the factual and legal basis for the service. Additionally, the court found appellants acted in bad faith and that the method of service was frivolous. Fees of $2,000 were awarded.

B. RICO Claim

The Radloffs and Pinotti were denied leave of court to file a fourth amended complaint to add a RICO claim. The trial court objected because the motion to amend was brought so late in the proceeding and because there was no pattern of criminal activity in this case. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-39, 109 S.Ct. 2893, 2899-2900, 106 L.Ed.2d 195 (1989). Appellants argue that they were motivated by a recent change in federal law that gave state courts concurrent jurisdiction over RICO claims. Even so, there was no factual basis in this case to prove any criminal activity by the bank. The trial court found bad faith, as the claim was "brought for the purpose of delay" and to increase the bank's costs. Additionally, the cause of action could not be "supported under existing law, or any good faith argument for [its] extension." Fees of $1,013 were awarded.

C. Motion to Join First American Farm Credit Co.

The Radloffs and Pinotti attempted to add a financial institution as another defendant. The timing was in direct violation of the trial court order which set a deadline for adding parties. Appellants listed the new entity in the case caption without leave of court. The trial court found their position frivolous, wasteful, without legal foundation, and lacking in good faith. No separate fees were assessed.

D. Personal Injury Claim

On April 10, 1990, the trial court granted the bank's motion for summary judgment on the Radloffs' claims for personal injury. The claims were for the negligent causation of emotional distress and concomitant physical effects. Appellants, however, never provided evidence linking the bank's commercial activities with the medical problems of the Radloffs, most of which predated the litigation.

Appellants cite *Venes v. Professional Serv. Bureau, Inc.*, 353 N.W.2d 671 (Minn.App.1984), to support their contention that no exacerbation of previous physical symptoms is required for liability. *Venes*, however, is an *intentional* emotional distress case which does not require physical manifestations and there *were* physical symptoms suffered by the emotionally distressed party in *Venes*.

The trial court awarded $5,000 to the bank, finding appellants failed to make "any reasonable inquiry into the underlying facts" to establish a causal link. Additionally, "[t]he claims were frivolous, unwarranted and without foundation."

E. Intentional Inflictions of Emotional Distress

A claim for intentional infliction of emotional distress separate from the personal injury claim was defended as barred by the statute of limitations. Nevertheless, appellants persisted with this claim over a two-year period. The trial court awarded fees of $967, finding the failure to perform preliminary research on the applicable law and refusal to dismiss the claim to be in bad faith. Appellants

dispute the monetary award, contending they were fined more than once for claims related to emotional distress. We agree that the additional award of $967 should be vacated, but we do not disagree with the trial court's reprimand of Pinotti.

F. Request for Judicial Notice

Appellants repeatedly argued that the trial court should take judicial notice of a 22-year-old criminal conviction of one of the bank's witnesses. Most recently they rehashed the argument during this appeal. Appellants persisted with a baseless theory. The trial court awarded fees of $1,099, finding bad faith, frivolity, and the lack of "any well-reasoned arguments for extension or reversal of existing law."

G. Tort Theory of Breach of Duty of Good Faith or Fair Dealing

[6] Appellants submitted a claim on a tort theory of breach of duty of good faith or fair dealing, but eventually withdrew it. There is no tort cause of action in Minnesota on this theory. *Wild v. Rarig*, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975), *cert. denied* 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976), *reh'g denied* 425 U.S. 945, 96 S.Ct. 1689, 48 L.Ed.2d 190 (1976). Appellants contend they admitted the current state of Minnesota law, but sought its change. They advanced no credible arguments, however, to support a modification of existing law. The trial court awarded $640, admonishing Pinotti that the groundless claim should not have been brought.

H. Claims Withdrawn by Appellants

[7] Subsequent to the bank's preparation of its memorandum for the May 1990 summary judgment motion, appellants withdrew eight claims: emotional distress, conversion, control, breach of contract, breach of confidential relationship, assault, wrongful dishonor, and prima facie tort. Appellants could have withdrawn the claims earlier, as they admitted they knew by April 13, 1990, that they did not intend to pursue these claims. Appellants defend by arguing that had they been asked directly about their plans, they would have responded truthfully. That is not an adequate defense for the failure to make timely disclosure. The trial court awarded fees of $11,318, finding a "bad faith omission" which caused a useless expenditure of time and effort by the bank.

III.

Denial of Attorney Fees to Radloffs

[8] Radloffs' claim to attorney fees is grounded on statements by the bank allegedly misrepresenting appellants' stance regarding the bank's right to setoff. Appellants argue that, contrary to the bank's assertions, they never contested the bank's right to offset any adverse jury award with the balance of the bank's loan discharged in Radloffs' bankruptcy proceeding. Appellants continue to persist in this argument, even though it is irrelevant because all of their claims were dismissed by the trial court prior to trial, precluding any jury verdict to set off. The trial court denied an award of attorney fees to Radloffs, and we affirm.

IV.

Notice Requirement

[9] *Uselman* requires notice of the possibility and reasons for the prospective imposition of sanctions. At issue in this case is whether Radloffs and Pinotti received adequate warning to provide them "the opportunity to correct future conduct." *Uselman*, 464 N.W.2d at 143. Although appellants did not precisely appeal the notice issue under *Uselman*, it should be addressed by this court.

On April 10, 1990, three months prior to the final hearing, the trial court granted the bank's summary judgment motion by dismissing the Radloffs' personal injury claims. Regarding Barbara Radloff's hypertension, the trial court stated that according to the medical evidence, the problem "pre-date[d] by a number of years the Radloffs' business dealings with defendants." As to Steven Radloff's claim, the trial court found it even weaker than Barbara's. The court disparaged the medical expert's opinion as "little more than plaintiffs' own version of events."

The summary judgment orders, along with numerous other orders denying relief to Radloffs, were ample warning to alert them that they could be subject to sanctions. Explicit warning was not required in this case, since unlike the pre-1986 version of Minn.Stat. § 549.21 relief upon by the *Uselman* court, the post-1986 version of the statute does not contain the provision which specifically required "timely notice of intent to claim an award." Further, the trial court here appropriately terminated all proceedings at the earliest opportunity, foreclosing most chances to warn specifically against appellants' actions.

DECISION

We find no abuse of discretion by the trial court in sanctioning Radloffs and their attorney; however, we vacate $967 of the award and reduce the $22,037 award of attorney fees to $21,070. We also affirm the denial of fees to the Radloffs.

Affirmed as modified.

STATE OF MINNESOTA
IN SUPREME COURT

Steven I. Radloff and
Barbara Radloff,

Petitioners,

vs.

First American National Bank of St. Cloud, N.A.; and First Farm Corporation, Inc. of St. Cloud, a Minnesota Corporation,

Respondents.

PETITION FOR REHEARING

APPELLATE COURT CASE NO.: C5-90-1792

DATE OF FILING OF THIS COURT'S DENIAL OF REVIEW: MARCH 27, 1991

Petitioners Steven and Barbara Radloff (hereinafter "Farmers") respectfully request this Court to reconsider its denial of March 27, 1991, under Rule 140.01 and to grant review. Farmers specifically incorporate herein all mattes of record.

Omitted Material Facts

Respondents' (hereinafter "Bank") intentional chemical destruction of 35 acres of perennial asparagus exceeded their 25 acre lease by 10 acres[1]:

$$35 - 25 = 10.$$

Bank had the pilot chemically destroy 35 acres on May 27, 1986, the last day of Bank's expressly limited 25

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[1] Ten nursery acres expands to 70 production acres. (C1).

acre lease. (C1, 2 & 15)[2]. Bank never had any right to possess the adjoining 10 acres of crops. Any other result overlooks the undeniable record and violates simple arithmetic rules: 35 acres minus 25 acres leaves 10 acres.

Another omission was that Bank lost its rights to become owners of the plants growing in the leased 25 acres on May 15, 1986, through an expressed agreement. (C4 & 25).

These errors are so fundamental that it should cause this Court to grant review to reassert cornerstone principles of due process. Rule 117 subd. 2(a); *Roepke v. Western National Ins. Co.*, 302 N.W.2d 350, 351 (Minn. 1981) [rehearing granted when a factual error led to an inaccurate conclusion]. Had these arithmetic and stipulated facts been acknowledged below, they would have defeated Bank's motions for summary judgment on all claims and defenses, except the Bank Holding Company Act claim.[3]

Controlling Principles

Due process, the right to a jury trial, and viewing the evidence in a light most favorable to the nonmoving party on summary judgment are the principles. *E.g.*,

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[2] "C" refers to the appendix attached herein.

[3] Had due process been equally applied, the BECA claim would have gone forward. No lower court addressed Bank's covert diversion of $10,000.00 of Farmers' money to Mr. Ambuehl, or Bank's $1,200.00 payment to Mr. Ambuehl for his services that led to and immediately preceded the May 8, 1985, takeover of Farmers' operation by Bank. (C5-7 & 40-42).

Offendahl v. University of Minnesota, 426 N.W.2d 425, 427 (Minn. 1988). Farmers' claims have been unconstitutionally infringed by the lower courts' view of the facts in an inverted light. "[J]ustice should not be traded for expediency . . . [we] must preserve fundamental aspects of justice." Hon. D. K. Amdahl, C.J. Minn. Sup. Ct., vol. 45, No. 6, Bench & Bar at 17, 18-19, (C34-35). The late Hubert Humphrey once stated that the measure of strength for government is how well it treats the underprivileged. Former Governor Albert Quie has recently stated that public officials should be held to the highest degree of accountability. Messrs. Quie's and Humphrey's words were directed at the legislative branch, but are applicable to the judiciary.

A judicial moral center begins with adherence to the most basic truths, such as arithmetic rules. The public needs a court's decision to be consistent with its moral center.

The lower courts erred by ignoring the 10 acres Bank did not lease and never had a right to possess. *Rieger v. Zackoski*, 321 N.W.2d 16, 20 (Minn. 1982) [an invitee trespasses by exceeding the scope or nature of the consent]. If *Rieger* is to be overruled, the public needs to know. This Court's recent decision in *Crowell v. Delafield Farmers Mutual*, 463 N.W.2d 737 (Minn. Dec. 7, 1990), finding an insurable property interest in a first right of refusal, is juxtaposed to the decisions below.

If 35 minus 25 equals zero, then *this* Court should address it to inform the public. Until this Court publishes such new precedent, 35 minus 25 still equals 10 and Farmers' claims survived summary judgment. This error

is so elementary it brings into serious doubt the lower courts' factual citations. In addition, the lower courts failed to address at least 20 other materials facts. (C10-11). Each one of these omitted facts would have changed the results below had due process been equally applied.

The past decisions endorse the exertion of brute force rather than legal process. When an economically powerful competitor drives a one weaker from the marketplace, there is substantial injury to constitutionally protected public interests. Minn. Const. art. 13, § 6 (prohibiting combinations affecting markets).

Farmers need this Court to direct the lower courts to address the factual record and apply due process equally.

Bank warned Farmers about life's golden rule: "The man with the gold, makes the rules." (C43). The lower courts' holding that 35 minus 25 equals zero is an adaptation of Bank's golden rule. The record also includes Bank's *ex parte* contacts with the trial judge and his law clerk *the day after* the July 11, 1990, hearing on summary judgment. (C38).

Is it going to be equally applied due process or Bank's "golden rule" that decides this case and governs lender-debtor relations in Minnesota? Shall Minnesota farmers arm themselves to protect against further self-help destructive tactics by lenders, as endorsed below? Chief Judge Wozniak has warned, "where law ends, tyranny begins." (C29).

Conclusion

Farmers request this Court to reconsider its denial of March 27, 1991, and grant their petition for review.

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STATE OF MINNESOTA
IN SUPREME COURT

Steven I. Radloff and
Barbara Radloff,

Petitioners,

vs.

First American National
Bank of St. Cloud, N.A.;
and First Farm
Corporation, Inc. of St.
Cloud, a Minnesota
Corporation,

Respondents.

PETITION FOR REVIEW

APPELLATE COURT
CASE NO.: C6-90-2658

DATE OF FILING OF
THE COURT OF
APPEALS' DECISION:
MAY 14, 1991

Steven and Barbara Radloff (hereinafter "Farmers") and their attorney Michael A. Pinotti (collectively "Petitioners") petition this Court for review.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is the case where Respondents (hereafter "Bank") intentionally destroyed 35 acres of perennial asparagus crowns to keep Farmers from competing with Bank in the marketplace. (A120).[1] Bank's rights, if any, were limited by written agreements to the plants on 25 of the 35 acres. (D15). At a minimum, the courts erred by

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[1] "A" refers to the appendix filed with the petition for review in case number C5-90-1792 (*Radloff II*). "D" refers to the appendix attached herein.

not recognizing that the aerial chemical attack exceeded by 10 acres (35 - 25) whatever rights Bank may have coerced. (D18). Petitioners now face sanctions of $21,070.

Petitioners incorporate D28 for the procedural history. Sanctions were not imposed until after Petitioners confronted the trial court about its *ex parte* contacts with Bank's lawyers that took place on July 12, 1990, one day after the summary judgment hearing. (D3-4). To date, no disclosure has a been made by the trial court concerning the nature of these contacts. See Trans. of Sept. 17, 1990 hearing and Order dated Oct. 1, 1990.

The timing of these *ex parte* contacts was acute.[2] After this Court denied Bank's petition for review in *Radloff I*, 455 N.W.2d 490 (Minn. App. 1990) on July 13, 1990, Farmers had appellate court support for at least seven claims. *Radloff I* found that "*there is support for the Radloffs' position* that the bank destroyed the crop to put the Radloffs at a competitive disadvantage in holding the property." *Id.* at 492 (emphasis added). Then on July 19, 1990 the trial court granted Bank's motions for summary judgment ruling, in part, that Farmers had no protectable interest in the crops or land, and, that their "representations . . . were false and they knew it" [without any citations to the record]. (A215). *Radloff I* was not cited by

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[2] Similar conduct by the same bank, represented by the same lawyers, was briefed to the appeals court in *Hommerding v. First American*, 381 N.W.2d 464 (Minn. App. 1986), *rev. denied*, April 11, 1986. (D23-24). The Hommerdings cited as error *ex parte* contacts between Bank's counsel and the trial judge and attached a letter by Attorney Timothy D. Moratzka complaining about additional wrongful contacts. (D24-25).

the appeals court in *Radloff II* (C5-90-1792) addressing the merits or *Radloff III* (C6-90-2658) addressing the sanctions.

ISSUES AND THEIR RESOLUTIONS BELOW

1. Whether Petitioners' rights to free access to the courts and due process were violated by having the same trial judge, who after having *ex parte* contacts with the Respondents, entered summary judgment on these ardent facts against Farmers, sit in judgment on the issue of costs and sanctions?

Result below: This issue was not addressed.

2. Whether the trial court erred by not giving a prior warning to Petitioners or abused its discretion by sanctioning them?

Results below: The appeals courts held in the negative.

3. Whether Judge Jack Davies should have been recused, *sua sponte* or on the record concerning former legislator/attorney Jack Davies' prior consultation with the Respondents on the statute of limitation issue addressed in *Radloff I*?

Result below: Judge Davies authored the opinion.

4. Whether Respondents committed sanctionable conduct for making a misrepresentation to the court, that was relied upon to grant their motion for summary judgment against Farmers?

Results below: The lower courts held in the negative.

5. Whether the issues of costs and sanctions should have been postponed because they were waived by Respondents?

Results below: The lower courts held in the negative.

ARGUMENT

Review should be granted to address these important issues, such as the impropriety of *ex parte* contacts, fair and equal access to the courts, due process and misrepresentation by a party to a court. Rule 117, subd. 2(a). The appeals court's opinion conflicts with this Court's holding in *Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990); the appeals court's holding in *Bergmann v. Lee Data Corp.*, 467 N.W.2d 636 (Minn. App. 1991); and, U. S. Supreme Court decision in *Business Guides v. Chromatic Communication*, 59 U.S.L.W. 4144 (1991). A review would clarify the law. Rule 117, subd. 2(c).

Business Guides ruled that sanctions are not designed to shift fees. 59 U.S.L.W. at 4150. In *Uselman*, this Court held the same and stated it would look to the U. S. Supreme Court as controlling. 464 N.W.2d at 142, 145. Had the appeals court applied this authority, the sanctions would have been reversed. The lower courts in *Radloff III* imposed sanctions based on Bank's counsel billing statements and justified their issuance by the "differing capacities to pay." (D12). This is fee shifting and conflicts with precedent.

Conduct cited as sanctionable below is presented in the Petitioners' brief attached beginning at page D34. For example, Farmers were ordered to reduce their claims

and they fully complied on April 13, 1990. (D42-44). Only after confronting the trial court about the *ex parte* contacts were they sanctioned for their compliance with a prior court order.

The impropriety of the *ex parte* contacts is illustrated, in part, by the trial court's contravention of *Radloff I*. Both lower courts' silence on the issue of *ex parte* contacts, is itself evidence of abuse and enigmatic. In *U. S. v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989), the circuit court held that a trial court's *ex parte* contact with a witness is sufficient to force the judge's removal.[3]

Justice without fair work is dead. For a party to be justified facts must be fairly addressed, not disparaged as occurred in *Radloff II* and *Radloff III*. (*E.g.* D13, A215). The existence of *ex parte* contacts, without judicial disclosure, shows that justice and fairness were absent below. "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their claims, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure justice is done." *Edmonson v. Leesville Concrete*, 1991 W.L. 89721 (S.Ct. 1991) [holding preemptory strikes of jurors on racial grounds unlawful]. *Ex parte* contacts, like racial

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[3] Also, Judge Davies should not have participated in or authored the appellate opinion, due to his personal knowledge. (D5-6). *See, Lilieberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2204-04 (1988); where a federal judge was recused where he may have not been aware of the conflict.

bias in the selection of jurors, "casts doubt on the integrity of the judicial process and places the fairness of the . . . proceeding in doubt." *Id.* The lower courts (in *Radloff II* & *III*) failed to meet the utmost case standard and denied due process to the Petitioners.

VI. CONCLUSON

This petition should be granted to address the importance of due process and fair access to the courts and to avoid conflict between *Uselman*, among others, and *Radloff III*.

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STATE OF MINNESOTA
IN SUPREME COURT
CASE NO. C6-90-2658

Steven I. Radloff and
Barbara Radloff,

Petitioners,

vs.

First American National
Bank of St. Cloud, N.A.;
and First Farm
Corporation, Inc. of St.
Cloud, a Minnesota
Corporation,

Respondents.

PETITIONERS' MOTION

Steven and Barbara Radloff (hereinafter "Farmers") and their attorney Michael A. Pinotti (collectively "Petitioners") move this Court to replace a document in the appendix and for leave to file a responsive memorandum to Respondents' affidavits, or, in the alternative, to strike the two affidavits submitted by Respondents to this Court and their Response to Petition for Review.

This motion is made under MRCAP Rules 127, 117, and 102.

1. *Motion to Replace Appendix Document*

On page 2, footnote 2, of their petition for review, Petitioners refer to page D24 in their appendix. Petitioners inserted the wrong page in their appendix and move this Court to allow the attached exhibit D24(a) to be

inserted instead. This inserted page cites the *ex parte* contacts between bank's counsel and that trial judge [during trial] upon which the Hommerdins appealed.

Under Rules 127 and 117, we ask this court to grant this motion to replace the stated document in their appendix.

2. *Motion for Leave to Permit a Responsive Memorandum or, for the Alternative Relief of, Striking the Response to the Petition for Review*

Respondents' noncompliant filings require a response which Petitioners will, if leave is granted, limit its memorandum to two (2) pages on the following issues:

A. The *ex parte* contacts admittedly dealt with at least one substantive issue.

B. The substantive issue discussed was the interim bankruptcy trustee's abandonment (meaning transfer) under 11 U.S.C.S. § 554 to the Farmers of the right to sue First American National Bank of St. Cloud, N.A.

C. It is upon this issue that the trial court concluded on summary judgment that Farmers' "representations . . . to the trustee about the value of the claims that they sought to have abandoned were false, and they knew it." (A215).[1] No citations were made to the record for it is without such proof.

D. The prejudice to Farmers and their attorney for having to justifiably argue that the lower courts failed to comply with the

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[1] Appendix filed with *Radloff II* (C5-90-1792).

utmost care standard of justice. (Petition p. 5).

Now more than ever, do these *ex parte* contacts show their prejudicial effect. Petitioners move this Court for leave to file a responsive memorandum.

If this Court does not allow Petitioners leave to file a responsive memorandum, Petitioners move this Court to strike Respondents' affidavits and their Response to Petition for Review as noncompliant under Rule 117. The affidavits are not of record, but were cited in the Response to Petition for Review. Respondents are without authority and have not moved this Court to permit these noncompliant filings.

Under Rule 127 and 117, Petitioners move this Court to strike Respondents' noncompliant filings.

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Dated: June 25, 1991

STATE OF MINNESOTA
IN SUPREME COURT

Steven I. Radloff and
Barbara Radloff,

Petitioners,

vs.

First American National
Bank of St. Cloud, N.A.;
and First Farm
Corporation, Inc. of St.
Cloud, a Minnesota
Corporation,

Respondents.

PETITION FOR
REHEARING

APPELLATE COURT
CASE NO.:
C6-90-2658

DATE OF FILING OF
THIS COURT'S
DECISIONS:
July 24, 1991

Steven and Barbara Radloff (hereinafter "Farmers") and their attorney Michael A. Pinotti (collectively "Petitioners") petition this Court to reconsider its denial of their petition for review. This petition is based on new matter issued by this Court and submitted too late for full consideration by the Justices.

ISSUE FOR REHEARING

Whether Petitioners' rights to free access to the courts and due process were violated by having the same trial judge, who after having *ex parte* contacts [on issues of law or fact] with Respondents, entered summary judgment on these ardent facts against Farmers, adjudicate the issues of sanctions and costs?

NEW PRECEDENT

The proscription against *ex parte* contacts [on issues of law or fact] contained in footnote 6 in *Graham v. Special School Dist. No. 1,* No. C8-90-1009, filed July 12, 1991, cannot be distinguished from this case unless this Court holds administrative law judges to a higher standard of care than district court judges. The federal courts would have addressed the issue and reversed any decision that occurred after *ex parte* contacts. *E.g., U.S. v. Kelly,* 888 F.2d 732, 745 (11th Cir. 1989). Yet here, Petitioners are being punished for the message they bear. The lower courts refused to address the *ex parte* contacts and, by their silence, acquiesced in such unethical, unlawful, and unconstitutional conduct.

Yoked with the duty to prosecute this wrong with the appropriate authority, Farmers' counsel reminds this Court that he is being sanctioned for performing obligatory tasks on behalf of his clients. Chief Justice Keith encouraged lawyers to enforce the rights of individuals during a speech to the recent state bar convention. The lower courts acquiesced in the *ex parte* behavior and then issued sanctions. The record fully supports Farmers and their counsel.

Double standards ought not be present in a courtroom.

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who

> stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and *judges act with the utmost care to ensure justice is done. Edmundson v. Leesville Concrete Co.*, 59 U.S.L.W. 4574, 4578 (S. Ct. 1991) (emphasis added).

If a party has proof that the other party or the court intentionally violated the law, then a fair court should address the violation. Where does the balance arm stand on this Court's scales of justice? A double standard exists if judicial misconduct is acquiesced by silence. Petitioners are economic victims of misconduct and its subsequent retaliation. Justice is humankind's attempt to set precedents of decency and to fairly adjudicate conflicts. *Ex parte* contacts, like racial bias in the selection of jurors, "casts doubt on the integrity of the judicial process and places the fairness of the . . . proceeding in doubt." *Id.* Sowing discord among citizens will lead to discontent, distrust, a lack of public confidence and, eventually, rebellion. Chief Justice Keith, *supra*, expressed concerns about the public's negative perception of the judicial system. Farmers had their crops and land injured by Bank's aerial chemical bombing. The courts in this state have yet to allow them a redress.[1] They sought counsel to enforce their rights in a court of law; not on the battlefield of self-help. The results in this case, especially for

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[1] Petitioners have filed a motion with the trial court under Rules 60.02(c) and 63.02, among others, and a Petition for a Writ of Certiorari to the Minnesota Court of Appeals (Case No. C5-90-1792) with the United States Supreme Court (Case No. 91-44). Further, under Rule 13.4 of the United States Supreme Court rules, Petitioners are required to exhaust their state court remedies on these issues of costs and sanctions.

Farmers and all debtor-lender disputes in Minnesota, dictate to shoot first and go to court later, maybe.

Petitioners should not be punished. Had Farmers' case been adjudicated by a court that applied the law equally, neither *Radloff II* nor *Radloff III* would have been necessary. The *ex parte* contacts expressly and admittedly dealt with the very issue upon which the trial court made the conclusion that Farmers "representation . . . were false and they knew it." (E2 & 7). Judge Balland did not support his conclusive allegation with any evidence in the record. Actual prejudice is present on the record.

THIS COURT HAS A DUTY TO ADDRESS EX PARTE CONTACTS

Granting a petition for rehearing is discretionary, except in this case where the *ex parte* contacts dealt with issues of law and fact. [E-7, E-10]. Having such knowledge, this Court has an obligation to address the problem. If a lower court grants private and special privileges to one party causing injury or loss of property to another, then that tribunal has denied due process and acted outside the scope of its jurisdictional authority. *See, Hoppe v. Klapperich,* 28 N.W.2d 780, 789 (Minn. 1947).

Do what is decent and grant this petition for rehearing.

MICHAEL A. PINOTTI,
LTD.

Dated: August 2, 1991

/s/ Michael A. Pinotti
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STATE OF MINNESOTA

IN SUPREME COURT

C6-90-2658

Steven I. Radloff, et al.,

Appellants,

vs.

First American National Bank
of St. Cloud, N.A., et al.,

Respondents.

ORDER

(Filed Jul. 24, 1991)

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Steven and Barbara Radloff for further review be, and the same is, denied.

IT IS FURTHER ORDERED that their motion to permit an additional reply or, alternatively, to strike documents appended to the response be, and the same is, denied.

Dated: July 24, 1991

BY THE COURT:

/s/ A.M. Keith
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C6-90-2658

Steven I. Radloff, et al.,

Appellants,

vs.

First American National Bank of St. Cloud, N.A., et al.,

Respondents.

ORDER

(Filed Aug. 15, 1991)

Based upon all the files, records, and proceedings herein.

IT IS HEREBY ORDERED that Steven I. Radloff, et al.'s petition for rehearing of denial of a petition for further review, be, and the same is, denied.

Dated: 8-15-91

BY THE COURT:

/s/ A.M. Keith
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEAL

Steven J. [sic] Radloff, et al.,

Appellants,

vs.

First American National Bank of St. Cloud, N.A., et al.,

Respondents.

ORDER

#C1-92-59

(Filed Feb. 5, 1992)

Considered and decided by Wozniak, Chief J., Peterson, J., and Amundson, J.

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

Appellants seek review of a December 9, 1991 order denying their motion to vacate judgments in an action that has been the subject of three prior appeals. An order refusing to vacate an appealable judgment is not appealable. *State of Georgia ex rel. Brooks v. Braswell,* 474 N.W.2d 346, 349 n.3 (Minn. 1991) Appellants' counsel became aware of the ex parte contact that is the basis for the present motion during the pendency of the second appeal. Appellants' failure to preserve the issue for this court's determination in the second or third appeal precludes further review, *See Mattson v. Underwriters at Lloyd's of London,* 414 N.W.2d 717, 721 (Minn. 1987).

IT IS HEREBY ORDERED this appeal is *dismissed.*

Dated: February 4, 1992

BY THE COURT

/s/ D.D. Wozniak
Chief Judge

AW:mbs

STATE OF MINNESOTA

IN SUPREME COURT

C1-92-59

Steven I. and Barbara Radloff,

Appellants,

vs.

First American National Bank of St. Cloud, N.A., et al.,

Respondents.

ORDER

(Filed Apr. 1, 1992)

Based upon all the files, records and proceedings herein.

IT IS HEREBY ORDERED that the petition of Steven and Barbara Radloff for further review be, and the same is, denied.

Dated: April 1st, 1992

BY THE COURT:

/s/ A.M. Keith
Chief Justice